Supreme Court, U.S.
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No. 93-1767

In The

Supreme Court of the United States

October Term, 1994

FRANK ATONIO, et al.,

Petitioners,

v.

WARDS COVE PACKING COMPANY and DOLE FOOD COMPANY, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF

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5 pp

TABLE OF AUTHORITIES

Page

CASES

American Construction Co. v. Jacksonville, Tampa & Key West R. Co., 148 U.S. 372 (1893) 1

Brotherhood of Locomotive Firemen v. Bangor & Arrostook R. Co., 389 U.S. 327 (1967) 1

Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939) 3

Dick v. New York Life Ins. Co., 359 U.S. 437 (1959) 3

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 1

Landgraf v. USI Film Products, 114 S.Ct. 1483 (1994) ...1, 3

Palmer v. Hoffman, 318 U.S. 109 (1943)..... 3

Rivers v. Roadway Express, Inc., 114 S.Ct. 1510 (1994) 1

United States v. General Motors Corp., 323 U.S. 373 (1945) 2

The United States in its brief in No. 93-1767 suggests that this Court summarily vacate the decision of the court of appeals and remand to reconsider the question of whether Sections 104 and 105 of the Civil Rights Act of 1991 apply to pending cases in light of *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994), and *Rivers v. Roadway Express, Inc.*, 114 S.Ct. 1510 (1994). Respondents, Wards Cove Packing Company and Dole Food Company, Inc., submit this supplemental brief in opposition to the United States.

The Solicitor General's position conflicts with the longstanding policy of this Court not to issue the writ where the judgment lacks finality, except in extraordinary circumstances. *American Construction Co. v. Jacksonville, Tampa & Key West R. Co.*, 148 U.S. 372, 384 (1893); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see Brotherhood of Locomotive Firemen v. Bangor & Arrostook R. Co.*, 389 U.S. 327, 328 (1967) (in denying *certiorari* stating: "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court").

The case now pends in the district court for further fact finding and a briefing schedule has been agreed to by the parties. That court will answer the three narrow questions posed by the court of appeals as to contentions of adverse impact based upon the use of "hiring channels," the feasibility of shifting housing accommodations after commencement of the canning season and the potential impact of ethnic "labeling" used by whites and non-whites alike. Brief of United States, 6, Pet. A33-A41.

Although petitioners argue that Sections 104 and 105 should be applied retroactively to this long-running controversy, the question of retroactivity may never be reached. The district court made initial findings that the employers' housing allocation was a reasonable business practice. Pet. A-190, 211, 231. Further development of those findings may make a determination of retroactivity of new standards on burden of proof and defenses posed by Section 104 unnecessary. Petitioners also argue that Section 105 relieves the employees of the need to prove which practices cause disparate impact. Pet. 12. Petitioners will likely be unable to prove that the selection process as a whole caused disparate impact because their statistics have been discredited and the Court of Appeals found no evidence to link even bottom line statistics to the use of subjective hiring criteria. Pet. A-28, 29, 31. Additional fact finding by the district court may make the retroactivity question moot as that court must in the first instance find disparate impact before causation becomes relevant. Thus, this case does not involve a controlling question of law which is fundamental to the further conduct of the case. *Cf. United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945).

As is clear from the submissions of petitioners and the United States, this case has been the subject of two district court decisions and six published appellate decisions.[1] The case period commenced during Richard Nixon's first term in office and we are in the thirteenth

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[1] An additional Court of Appeals' interlocutory decision of June 16, 1980, affirming the denial of a motion for preliminary injunction was not published.

year since trial. The case should not be interrupted for yet further delay on an issue which may have no bearing on its ultimate outcome.

Finally, a summary reversal and remand should not be granted where the arguments for retroactivity are so weak. A change in the burden of proof, or in causation requirements or in the elements of a defense after a trial are not supportable as "procedural" inasmuch as the strategy and conduct of the trial have already taken place. *See Landgraf*, 114 S.Ct. 1483, n.29.[2] Petitioners concede and the United States does not dispute that this Court has consistently regarded the burden of proof as substantive under the *Erie* rule. *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446 (1959); *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943); *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 212 (1939).

In light of the foregoing, the petition should be denied.

DATED this 1st day of September, 1994.

Respectfully submitted,

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[2] Indeed, since the event is the trial itself, application of a new procedure is not retroactivity at all.